NO. 22347
NO. 22347-A
NO. 22347-B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL B. DURAN, ANTONIO GONZALEZ GUTTIEREZ and JOSE LUIS MARTINEZ CRUZ,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADING AND FACTS DISCLOSING JURISDICTION

Appellants were indicted by the Federal Grand Jury for the Central Division of the Southern District of California on June 8, 1966 [C. T. 3-9].[1/] The indictment was brought under Title 21 United States Code, Section 174 and charged that the appellants conspired to import narcotics into the United States from Mexico.

1/ "C. T." refers to Clerk's Transcript of Record.

The indictment also charged appellants with the concealment of large quantities of heroin in Los Angeles County.

On July 6, 1966, the case proceeded to trial before Judge Charles H. Carr. On July 8, 1966, the appellants were convicted by a jury on all counts of the indictment [C. T. 66, 67, 68].

On September 26, 1966, appellant Duran was sentenced to the custody of the Attorney General for a period of fifteen (15) years on Counts 1, 2 and 5, the sentence on each count to run concurrently [C. T. 178]. Appellants Cruz and Guttierez were each sentenced to five (5) years on Counts 1 and 5 with the sentence on each count to run concurrently [C. T. 182, 183].

Appellants' Notice of Appeal was timely filed on September 26, 1966 [C. T. 179]. The jurisdiction of the District Court was based upon Title 21, United States Code, Section 174, Title 18, United States Code, Section 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

The indictment was brought under Title 21, United States Code, Section 174 which provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or

any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years . . .

"Whoever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTIONS PRESENTED

A. Have Appellants Voluntarily Waived Their Right Under Rule 41(e) to Move to Suppress Evidence Allegedly the Result Of An Illegal Search and Seizure?

1. Does the failure to object to allegedly illegally seized evidence before or during trial constitute a waiver of appellants' right to suppress such evidence?

2. Where appellants have knowledge of the circumstances surrounding a seizure long prior to trial does the failure to make a pretrial motion to suppress evidence affect a waiver of the right to move to suppress?

B. Were The Searches of the Motel Rooms on May 6th and May 12th Valid?

1. Was the seizure of the heroin on May 6th the result of a private search and as such immune from a Fourth Amendment challenge?

2. Was the search at the Gales Motel based on probable cause?

3. Have appellants waived their right to object to the manner of entry by the police into Room 24 at the Gales Motel?

4. Was the package of heroin found in the Gales Motel lawfully obtained?

C. Was the Evidence Sufficient to Sustain the Verdict of Guilt on Count V?

1. Was the evidence sufficient to establish that appellant Duran was in constructive possession of the heroin charged in Count V?

2. Did the evidence show that appellant Duran had the power to exercise dominion and control over the heroin found at the Gales Motel?

3. Was the evidence sufficient to prove that appellants Cruz and Guttierrez were in joint possession of the heroin found inside their motel room?

D. Was the Evidence Sufficient to Sustain the Finding of Guilt on Count One?

1. Did the trial court properly instruct the jury with regard to the conspiracy charge?

2. Was the evidence sufficient to sustain the conspiracy charge as to appellants Cruz and Guttierrez?

E. Were Appellants Denied the Effective Assistance of Counsel?

1. Were appellants prejudiced by their voluntary choice to be represented by one counsel?

2. Did trial counsel's strategy deprive appellants of the effective assistance of counsel?

F. Did the Trial Court Deprive Appellants of a Fair Trial?

G. Was There Any Multi-Count Prejudice Which Would Require a Reversal of the Entire Judgment of Conviction?

IV

STATEMENT OF FACTS

A. SUMMARY OF THE EVIDENCE

In approximately the third week of April, 1966, appellant Daniel B. Duran met with co-defendant Robert Vasquez and unindicted co-conspirator Alfred Joseph Ales in a restaurant to discuss the importation into the United States of narcotics from Mexico [R. T. 87]. 2/ During the meeting Duran asked Ales to commence working for him in the narcotics traffic. Duran explained his business operations to Ales as follows: Male Mexicans would smuggle heroin in to the United States for Duran and bring it to motels in the El Monte-San Gabriel area [R. T. 89]. After arriving in the United States the Mexicans would telephone Duran to inform him that the narcotics had arrived. Thereafter Duran was to telephone Ales who in turn was to meet the Mexicans, pick up the narcotics and hold it until he received further instructions from Duran [R. T. 88, 89]. Ales was to receive $200.00 for each shipment of narcotics that he picked up for Duran [R. T. 91].

On May 4, 1966, at approximately 6:00 P.M., Ales spoke with Duran at Ales' house [R. T. 92]. Duran then drove Ales to the house of co-defendant Robert Vasquez [R. T. 95]. After arriving at Vasquez' home the three men waited for a telephone call from two

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2/ "R. T." Refers to Reporter's Transcript of the Proceedings.

Mexicans who were due to make delivery of a shipment of narcotics from Mexico [R. T. 97]. The expected call never came through so Duran drove Ales back to Ales' house. Duran stated that he would telephone Ales in one hour. As Ales was getting out of the car Duran handed him a package containing $7,500.00, to pay for the narcotics when it arrived [R. T. 99].

Shortly thereafter Duran telephoned Ales and said that the two Mexican men would call him at 6:00 A. M. [R. T. 100]. At 6:00 A. M. on May 5, 1966, Ales received the call from the Mexicans and was directed to the Nine-0-One Motel in El Monte [R. T. 101]. Ales then picked up Vasquez and both men proceeded to drive to the Motel [R. T. 102].

After arriving at the Motel Vasquez gave the Mexicans the $7,500.00 and Ales received the package containing the heroin [R. T. 103]. Thereafter the two men returned to Vasquez' home where upon examining the package they found 40 condoms containing heroin [R. T. 104]. While Ales and Vasquez were counting the condoms of heroin Duran arrived and instructed Ales to leave 11 condoms with Vasquez and to take 29 condoms with him [R T. 106]. Duran left and thereafter Ales proceeded to rent a room at the Alexandria Motel on Figueroa in Los Angeles. Ales placed the remaining 29 condoms of heroin inside of a brown paper bag and left it under the bed of the motel room [R. T. 107]. Ales then left and returned to his own residence. He only used the motel room as a hiding place for the heroin [R. T. 108].

Thereafter, on the morning of May 6, 1966, the bag

containing the 29 condoms of heroin was found under the bed in the motel room by a member of the motel cleaning staff in the course of his regular daily cleaning chores [C. T. 213]. The package was then taken into the manager's office who in turn notified the police. Officer Panzica arrived at the motel and was shown the paper bag by Mrs. Greves, the Manager. Officer Panzica observed that the bag contained two plastic containers, each one containing numerous condoms with a white powder inside. The officer extracted one condom from the bag, felt it, determined that it contained heroin, then placed the condom back inside the bag. At the direction of the officer the paper bag was then placed back inside the room where it had been found [C. T. 254]. Officer Panzica then telephoned his superior officers and told them that he had found a huge amount of heroin. Shortly thereafter two additional officers of the Los Angeles Police Department arrived at the Alexandria Motel. Officer Evans was advised of Officer Panzica's activities and of the return of the heroin to the motel room. The Manager, Mrs. Greves, then took Officer Evans to the room, opened the door and admitted Officer Evans and his partner. Officer Evans examined the package and determined that it contained narcotics. The package was returned to its original location under the bed and the police officers at the scene placed the room under surveillance [C. T. 213].

At approximately 11:25 A. M., Ales arrived back at the motel to pick up the heroin and was placed under arrest [R. T. 108, C. T. 214]. After his arrest it was determined that Ales had

a record of three prior felony convictions, including two for narcotics violations.

Ales agreed to cooperate with the police and proceeded to implicate Duran and Vasquez. That same evening at approximately 7:30 Ales accompanied Officer Sanchez to his home to await a phone call from Duran [R. T. 208]. However, Ales' phone was out of order so Duran was forced to come by. Ales was sitting in the back room with Officer Sanchez who was dressed in civilian clothes when Duran came walking in [R. T. 209]. Duran said to Ales, "Hi, do you have it?" [R. T. 209]. A relative of Ales then entered the room and said that the place was crawling with cops. Duran then asked if the two men wanted a beer and exited the room. Thereafter Duran was arrested running down the street toward his car [R. T. 296].

On May 11, 1966, acting upon the information supplied by Ales, State Officers proceeded to Robert Vasquez' house to place him under arrest. Vasquez was arrested in the bathroom of his residence flushing powder down the toilet bowl [R. T. 215]. A search of Vasquez' person produced a baseball card on which was written the words: "Gales Motel, 3029 San Gabriel, Room 24." [Ex. 4 c, R. T. 215]. Later that same evening at approximately 12:00 the officers proceeded to the Gales Motel. Officer Sanchez went to stall number 24 where he saw a 1959 blue Mercury bearing California license number JUV 174 [R. T. 219]. Officer Sanchez was able to see into the car and note the vehicle registration which indicated that the car was registered to Juan Gonzales of 3520

Warwick, Los Angeles. Officer Sanchez knew of the address on Warwick as he had previously seen appellant Daniel Duran there on many occasions [R. T. 222].

Thereafter Officer Sanchez proceeded up the stairway of the motel to room 24 accompanied by Officers McCarver and Stevenson [R. T. 222]. Officer Sanchez then stopped outside the door of room 24 and heard what sounded like deep breathing. Officer Sanchez then knocked on the door on two separate occasions, identified himself as a police officer, waited a minute and after receiving no response he entered the room [R. T. 223]. As Officer Sanchez entered he identified himself and showed his identification to appellant Guttierez. Appellants Cruz and Guttierez were searched. A card was taken from the person of appellant Cruz which had Robert Vasquez' telephone number written on it [R. T. 232].

Thereafter the police proceeded to search room 24 for between half an hour to an hour and a half. No narcotics were found in the room at that time but appellants Cruz and Guttierez were arrested on suspicion of narcotics violations in connection with the 29 ounces of heroin found inside the Alexandria Motel on May 6, 1966. About 11 hours later, after appellants Cruz and Guttierez had been taken into custody Mrs. Wise, the motel manager, found a package containing narcotics in a wastebasket lying on its side in Room 24 [R. T. 191]. Mrs. Wise then took the package containing the narcotics downstairs to the motel office and called the police. Thereafter the heroin was turned over to

the police [R. T. 192].

B. THE TRIAL

On Monday, June 20, 1966, appellants Duran, Cruz and Guttierez appeared in District Court before Judge Charles H. Carr for arraignment on the indictment. Attorney David C. Marcus appeared as retained counsel for all three appellants [R. T. 4, Vol. A]. Judge Carr immediately made inquiry as to whether there might be any possible conflict of interest and the following colloquy took place:

> "THE COURT: You represent all three of them?
>
> "MR. MARCUS: Yes, your Honor.
>
> "THE COURT: You have no problems, I take it?
>
> "MR. MARCUS: So far I find no problems.
>
> "THE COURT: Well, now, Counsel, I am not telling you how to run your business, but if there is the slightest hint of conflict you had better be sure of it in advance before we come to trial." [R. T. 4, Vol. A].

Mr. Marcus also indicated that he represented appellants Cruz and Guttierez in the State Court on charges arising out of the same offense [R. T. 4, Vol. A]. Mr. Marcus went on to indicate that he had represented Cruz and Guttierez at the State preliminary hearing and that he was presently moving to dismiss the

State charges. Mr. Marcus also represented to the Court that he had represented co-defendant Robert Vasquez in the State court and that the charges in the State court against Vasquez had been dismissed [R. T. 7, Vol. A].

Mr. Marcus informed the Court that he had a motion to file. The basis of the motion was to suppress the testimony of unindicted co-conspirator Alfred Joseph Ales because Ales' constitutional rights had allegedly been violated [R. T. 11, 12, 16, Vol. A]. Judge Carr advised Mr. Marcus to file his motion prior to trial and that there would be a hearing on the motion the morning of the trial.

On July 1, 1966, Mr. Marcus filed a "Motion to Suppress and Dismiss Indictment." [C. T. 23]. The motion went on to indicate that the appellants "will move said court for its order suppressing and dismissing the indictment in the above-entitled proceedings." As grounds for the motion appellants urged that:

"1. The evidence received by the Grand Jury was insufficient and inadequate in law to support the indictment.

"2. The evidence presented to the Grand Jury in support of the indictment was illegally and unlawfully obtained, in violation of the constitutional rights of each of the named defendants." [C. T. 25].

The affidavit of appellant Daniel B. Duran was the only affidavit filed by appellants in support of their motion. The affidavit states in substance that unindicted co-conspirator Alfred Joseph Ales was unlawfully induced and coerced into testifying

before the Federal Grand Jury without the assistance of counsel and "that by reason of the supervisory authority of the United States District Court over the United States Attorney, the officers, agents and employees of said United States Attorney, the evidence so elicited and unconstitutionally procured from said defendant Ales was inadmissible before the said Federal Grand Jury and is inadmissible before the United States District Court." [C. T. 39]. Finally appellant Duran went on to allege that the "basis for the indictment of the defendants in this matter is solely predicated upon the evidence so elicited from said Ales, and that no other evidence before said Federal Grand Jury is sufficient in itself to support said indictment." [C. T. 39, 40].

On July 5, 1966, appellants appeared before Judge Carr for hearing of their motion to suppress and dismiss the indictment and to commence trial [C. T. 42]. The Court inquired of appellants' counsel as to the grounds for the motion to suppress and dismiss the indictment. Mr. Marcus responded that the motion was predicated on the fact that unindicted co-conspirator Alfred Ales, in the absence of his retained counsel, was taken before the Federal Grand Jury [R. T. 7]. Mr. Marcus went on to argue that Mr. Ales' constitutional rights had been violated and that the appellants should be able to assert the alleged illegality in light of the fact that Ales was part of the conspiracy [R. T. 9]. The motion was denied.

Thereafter, just prior to the selection of the jury, the Court again inquired as to whether there might be any conflict of

interest.

"THE COURT: All right. Are you representing all three of the defendants, Mr. Marcus?

"MR. MARCUS: Yes, Your Honor, I do.

"THE COURT: I take it there is no prospect of any conflict of interest.

"MR. MARCUS: No, Sir." [R. T. 14].

The case then proceeded to trial. The Government called unindicted co-conspirator Alfred Ales as a witness. Appellants' counsel, outside the presence of the jury, requested permission of the Court to interrogate Ales regarding the competency of his testimony [R. T. 84]. Mr. Marcus indicated that he was desirous of interrogating Ales concerning the offers, if any, to induce him to testify on behalf of the Government. The Court first inquired whether Ales had counsel present whereupon Assistant United States Attorney Jo Ann Dunne informed the Court that Ales did not have an attorney present because he had indicated that he did not want one [R. T. 84, 85]. Mr. Marcus concluded by informing the Court that he had with him the transcript of the preliminary hearing where he had represented co-defencant Robert Vasquez [R. T. 85]. The Court denied counsel's request and allowed Ales to testify.

On July 7, 1966, at 9:30 A. M., the third day of trial, appellant Daniel B. Duran failed to appear in Court [R. T. 178]. The Court determined to proceed with the trial in Duran's absence pursuant to Rule 43 of the Federal Rules of Criminal Procedure.

The jury was instructed not to consider Duran's absence in any way in determining his guilt or innocence [R. T. 181], and the trial continued.

During its case-in-chief the Government offered the testimony of Officer Edward Sanchez of the Los Angeles Police Department. During his direct testimony Officer Sanchez testified with regard to the entry and search of Room 24 at the Gales Motel on May 12, 1966 [R. T. 223]. Counsel for the appellants attempted to take Officer Sanchez on voir dire to inquire whether the police had a search or arrest warrant in their possession when they entered Room 24. Thereafter the following colloquy occurred between the Court and counsel:

"MR. MARCUS: Did you have a search warrant or a warrant of arrest when you entered the premises?

"THE COURT: This comes at a rather late time doesn't it counsel?

"MR. MARCUS: No, Your Honor. Not with respect to this evidence it doesn't.

"THE COURT: Weren't you aware of this prior to now?

"MR. MARCUS: In other proceedings I was aware of this. But it did not, in my opinion, become relevant in this case until this moment." [R. T. 233].

Thereafter counsel objected to any testimony regarding Exhibit 8 (the card found on appellant Cruz bearing Robert Vasquez'

telephone number) on the ground of illegal search and seizure [R. T. 234]. The motion was denied, the Court holding that counsel had waived his opportunity to move for suppression of evidence under Rule 41 of the Federal Rules of Criminal Procedure [R. T. 238]. Further on the Court stated:

> "Now the whole tenor of your motion was what occurred before the Grand Jury, and I find nothing in the affidavit or motion relating to any unlawful arrest procedure." [R. T. 258].

Finally the Court observed that Mr. Marcus "has read from records showing that he is fully familiar with these matters, that he has had ample opportunity and has known all about the situation and circumstances of this arrest long prior to this trial, and that he has not filed a motion in accordance with Rule 41(e)." [R. T. 260].

At the conclusion of the Government's case-in-chief Mrs. Dunne offered Exhibits IB and 2B [R. T. 360, 364]. Mr. Marcus objected to the introduction of I-B (the heroin found at the Alexandria Motel on May 6, 1966) [R. T. 303] on the grounds that:

1.) No conspiracy had been established;

2.) No corpus delicti had been established;

3.) The insufficiency of evidence [R. T. 302].

The motion was denied and Exhibits I-B and 2-B (the heroin found on May 12, 1966, at the Gales Motel) was admitted into evidence [R. T. 307]. Thereafter counsel moved for a judgment of acquittal

on the grounds of:

1.) Insufficiency of the evidence;

2.) That no conspiracy had been established between the defendants;

3.) That no corpus delicti had been established insofar as the three defendants were concerned [R. T. 309]. The motion was denied.

At the conclusion of appellants' case Mr. Marcus again moved for a judgment of acquittal based on the alleged failure of the Government to prove a corpus delicti and a lack of possession as to appellant Duran [R. T. 435]. The motion was denied. After argument by counsel the Court proceeded to instruct the jury on the law. At the conclusion of the Court's instructions no objections were made as to any of the instructions. The Court inquired at that time:

> "THE COURT: All right, gentlemen. Do you feel it is necessary to approach the bench?
>
> "MR. MARCUS: No, Your Honor.
>
> "THE COURT: You have the opportunity if you desire it.
>
> "MR. MARCUS: No, Your Honor." [R. T. 561].

Thereafter, all of the defendants were convicted by the jury on the charges in the indictment.

V

ARGUMENT

A. APPELLANTS HAVE KNOWINGLY AND VOLUNTARILY WAIVED THEIR RIGHT UNDER RULE 41(e) TO MOVE TO SUPPRESS EVIDENCE ALLEGEDLY THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE.

Appellants now claim for the first time that the 29 ounces of heroin found in the Alexandria Motel on May 6, 1966, was the product of an illegal search and seizure. Appellants also allege that the search of the Gales Motel on May 12, 1966, was illegal.

On June 8, 1966, the indictment in the instant case was returned. Trial was set for July 5, 1966. The Court ordered that all motions be filed by June 24, 1966. On July 1, 1966, a "Notice of Motion to Suppress and Dismiss Indictment" was filed supported by an affidavit of appellant Daniel B. Duran. The affidavit at page 14, clearly states that the purpose of the motion was to dismiss the indictment. It was not a motion to suppress evidence alleged to have been illegally seized. The affidavit endeavors to establish the bias and prejudice of a witness, Alfred Joseph Ales; it also alleges that certain of Mr. Ales' constitutional rights under the Fifth and Sixth Amendments to the Constitution had been violated.

On the morning of trial, the defendants made certain oral motions which were denied. They did not make a motion to suppress the evidence [R. T. 4-14, Vol. 1].

The Government offered testimony concerning Exhibit I-B

(the 29 ounces of heroin described in Counts One and Two of the indictment, seized on May 6, 1966, at the Alexandria Motel), and Exhibit II-B, (approximately 20 ounces of heroin described in Count Five of the indictment, seized on May 12, 1966, at the Gales Motel). When the Government offered these two exhibits into evidence there was no objection on the ground of an illegal search and seizure [R. T. 302].

At the conclusion of the Government's case in chief, the defense moved for a judgment of acquittal. The motion for acquittal was not based on the ground of an illegal search and seizure [R. T. 309]. At the conclusion of the entire case, appellants renewed their motion for a judgment of acquittal. The motion for judgment of acquittal was not based on the ground of an illegal search and seizure [R. T. 435].

The only objection to the introduction of evidence on the ground of an illegal search and seizure was made orally during the testimony of the Government's seventh witness, regarding Government's Exhibit No. VIII (a piece of cardboard containing the telephone number of Robert Vasquez which was removed from the person of appellant Cruz following his arrest) [R. T. 234].

Appellants had previously been made aware of Exhibit VIII and the circumstances surrounding its seizure because Sergeant Sanchez of the Los Angeles Police Department had previously testified regarding the Exhibit and the search of the Gales Motel in the state court preliminary hearing on May 23, 1966, when Mr Marcus acted as defense counsel for appellants Cruz and Guttierez

[R. T. 264]. The only explanation offered for the untimely motion by Mr. Marcus was that although the defense was aware of this evidence and the circumstances surrounding its seizure, from the state court proceedings, they did not feel that the issue became relevant in the instant case until that particular moment [R. T. 233].

1. The Failure To Object To Evidence Alleged To Have Been Illegally Seized Before Or During Trial Constitutes A Waiver Of The Right To Suppress Such Evidence.

Rule 41(e), Federal Rules of Criminal Procedure provides that:

> "The motion [to suppress illegally seized evidence] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

It is a well-settled principle that if a defendant was aware of the grounds for a motion to suppress evidence and had ample opportunity to make such motion, but failed to make either a pre-trial motion or to object during the trial, the defendant has waived his right to object to the admissibility of the evidence seized.

This Court has previously held that:

"Failure to make objection to evidence either before or at trial precludes consideration of objections thereto on appeal unless good cause of such failure is shown . . . No good cause is shown here."

Bouchard v. United States, 344 F. 2d 872, 875 (9th Cir. 1965).

In Billeci v. United States, 290 F. 2d 628 (9th Cir. 1961) the defendant failed to move to suppress evidence before or during trial. On appeal defendant contended that the disputed evidence was the fruit of an illegal search and seizure. This Court stated:

"The admitted normal rule is that an appellate court will not consider matters which are alleged as error for the first time on appeal, and this is true of criminal as well as civil cases. However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would seriously affect the fairness, integrity, or public reputation of judicial proceedings. The appellate tribunal will examine the record sufficiently to determine whether such has occurred." (Id. at 629)

However, even assuming that the disputed evidence was obtained from an illegal search and seizure, the court in Billeci adjudged that the erroneous admission of such evidence did not have a detrimental effect on the trial. Therefore, the court declined to consider the issue on appeal, stating:

"Evidence which is the product of an illegal seizure is not denied admission in a federal criminal proceeding because it is necessarily untrustworthy but rather it is excluded on the grounds of public policy to discourage overzealous law enforcement officers from resorting to police state tactics . . . The admission of such evidence could not affect the 'fairness, integrity, or public reputation' of the proceedings below. Appellant's failure to proceed in accordance with Rule 41(e) prevents this court from now considering this claimed error." (Id. at 629).

Other grounds on which Appellate courts have based their refusal to consider the issue of probable cause for the first time on appeal were set forth in Gendron v. United States, 295 F. 2d 897 (8th Cir. 1961) citing and following Billeci v. United States, supra, where the Eighth Circuit noted:

"The plain error rule should be applied with caution and should be invoked only to avoid a clear miscarriage of justice. To exercise the right freely would undermine the administration of justice and detract from the advantage derived from ordered rules of procedure." (Id. at 892).

Moreover, in Gendron the Eighth Circuit discerned that to consider the matter on appeal for the first time would sometimes

allow the defendant to assert a contention inconsistent with his theory of defense at trial. In Gendron, the defendant was charged and convicted of receiving and concealing stolen government bonds. His defense at trial was his contention that he did not know the bonds were in his automobile where they were seized by government agents. The Eighth Circuit did not see why defendant should be allowed to assert the issue of probable cause on appeal when he unsuccessfully pursued another theory at trial. (Id. at 903).

Accord: Bouchard v. United States, supra;

Barba-Reyes v. United States, 387 F. 2d 91, 93 (9th Cir. 1967);

Williams v. United States, 358 F. 2d 325 (9th Cir. 1966);

United States v. Weldon, 384 F. 2d 772, 775 (2nd Cir. 1967).

Likewise, in the case at bar appellants were charged and convicted of concealing and conspiring to smuggle and conceal heroin. Their defense in the court below was that the heroin found in the two motel rooms did not belong to them and that they did not know that the heroin was even in the rooms.

2. Where Defendants Have Knowledge Of The Circumstances Surrounding A Seizure Long Prior To Trial And Fail To Make A Motion To Suppress Before Trial They Have Waived Their Rights With Respect To The Admissibility Of Such Evidence.

Where the record is clear that the defense has knowledge of a seizure long prior to trial and where counsel has had ample opportunity to exercise the right provided by Rule 41(e) to suppress the fruits of that search the appellants will be deemed to have waived the right to move to suppress the evidence unless such motion is made prior to trial. In Rocchia v. United States, 78 F. 2d 966 (9th Cir. 1935) this Circuit held:

> "It has been uniformly held that a motion to suppress made upon the trial comes too late where the defendant has knowledge of the seizure long prior to the trial and neglects to make such a motion before trial."

See also: Rose v. United States, 149 F. 2d 755, 760 (9th Cir. 1945) (opinion emphasizes that defendant knew of the seizure for seven months prior to trial.); United States v. Fowler, 17 F. R D., 499, 500 (S. D. Calif. 1955) (When defendant moves to suppress at trial . . . "the Court must be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim."

In United States v. Shavin, 320 F. 2d 308, 313 (7th Cir. 1963):

"The indictment was returned on March 30, 1961; the trial was commenced on November 20, 1961, and not until the trial had proceeded into the testimony of the fourth witness did the defendant make a motion to suppress the evidence . . . Under the circumstances presented the defendant must have been aware of the grounds for his motion to suppress and had a long period of time prior to the trial to file the motion. The trial court was, therefore, justified in denying the motion to suppress at the time it was presented."

With regard to the issue of appellants' admitted prior knowledge of the facts surrounding the seizure of May 12, 1966, at the Gales Motel the case of United States v. Watts, 319 F. 2d 659 (2nd Cir. 1963) is particularly significant. In the Watts case the defendant filed a motion to suppress evidence prior to trial. Following hearing thereon the Court denied the motion without prejudice. Trial commenced and resulted in a mistrial. A new trial date was set. Defendant filed no motion to suppress evidence prior to the second trial. In defendant's opening statement at the second trial, he mentioned an illegal search and seizure and a motion to suppress evidence. In addition, at the time the Government sought to introduce the evidence at the second trial the defendant objected on the ground of illegal search and seizure. The District Court Judge declined to entertain a motion to suppress

since the defendant had failed to raise the issue in advance of trial and could have done so. The Circuit Court held that the defendant clearly had an awareness of the grounds for the motion and an opportunity to make the motion. Therefore, the District Court did not abuse its discretion in refusing to conduct a hearing at that late date.

In the case at bar the record is clear that appellants had full knowledge of the facts and circumstances surrounding the searches in question. Trial counsel's decision to follow another line of defense other than the one presently being urged before this Court was freely and intelligently taken. Appellants should not now be allowed to challenge searches to which they made no proper objection in the Court below. Without the proper motion having been made the record on this appeal is of course inadequate in that the circumstances of the searches were never fully developed.

B. THE SEARCHES OF THE MOTEL ROOMS ON MAY 6th AND MAY 12th WERE VALID.

It is the Government's contention that appellants have waived any rights to challenge the searches of the motel rooms in question. However, should this Court wish to consider the issue of the legality of the searches for the first time on this appeal the Government's position will be set forth below.

Preliminarily it should be noted that the facts and

circumstances surrounding the search of Alfred Ales' room at the Alexandria Motel on May 6, 1966, were never fully developed in the Court below. The facts relied upon by appellants and the Government before this Court are taken from the affidavits of Los Angeles Police Officers filed in the related prosecution of co-defendant Robert Vasquez. (United States v. Robert Vasquez, No. 36277-CD). The inadequacy of the record on this point should serve to substantiate the Government's position that appellants' failure to move timely to suppress in the District Court and their failure to develop all of the relevant facts surrounding the search should preclude them from now attacking the search.

1. The Seizure Of The Package Found In Ales' Motel Room Was The Result Of A Private Search And As Such Is Immune From A Fourth Amendment Challenge.

Appellants acknowledge the validity of the principle set forth in Burdeau v. McDowell, 256 U.S. 465 (1921), "to the effect that the Fourth Amendment does not apply to searches and seizures conducted by private persons." Appellants, however, seek to distinguish the Burdeau case by alleging that here state officers participated in the search. While the record is not as clear as would be desirable it is readily apparent that in the instant case the Motel Manager, Mrs. Greves, actually turned over the incriminating evidence to the state authorities thus effecting a "fait accompli" requiring no further Government action to procure the evidence. Appellants concede that "In Burdeau

private persons stole incriminating papers and delivered them to federal prosecutors. Thus, in that case federal officers were forced with a fait accompli, no further Government action was necessary to procure the evidence. There was nothing left to seize and no search was necessary." (Appellants' Brief page 39).

The Government would submit that appellants are correct in this regard and that, furthermore, the facts of the instant case are practically indistinguishable from Burdeau. Mrs. Greves actually handed the heroin over to officer Panzica. While the record is not clear as to exactly what Mrs. Greves actually told Officer Panzica when he first arrived at the Alexandria Motel it is submitted that his action was perfectly reasonable and in no way could it be considered an improper police action. In fact, had he failed to look into the suspicious package which Mrs. Greves handed to him he might well have been considered to have been derelict in his duties as an officer. See Frye v. United States, 315 F. 2d 493 (9th Cir. 1960).

It is important to note that this is not a case where a private party "discovers contraband and notifies the . . . agents of that fact, and the agents then secure a warrant on the basis of this information and conduct a search." Corngold v. United States, 367 F. 2d 1, 6 (9th Cir. 1966). It is submitted that the above-quoted dictum from Corngold would appear to pertain to a circumstance where a private party finds obvious contraband and then telephones the authorities indicating to them that he has in his possession the contraband and that there is no danger of destruction

or removal of the contraband. In the case at bar the most that the record shows is that Officer Panzica received a radio call to see a woman at the Alexandria Motel regarding found property [C. T. 253]. The record does not indicate that he ever knew that the property was in fact heroin until he first examined it. Thus, by the time Officer Panzica knew that the package contained heroin he had already seen and touched the narcotics; thus obviating any reason he might have had to obtain a search warrant which would only have enabled him to see what he had already seen.

The Government would submit that Officer Panzica's actions were, taken as a whole, reasonable and proper, If this is so the requirement of obtaining a search warrant vanished when "no further Government action was necessary to procure the evidence." (Appellants' Brief, page 39).

Finally, it is important to distinguish the Corngold case, supra, from the instant one. In Corngold the Customs Agents initiated, directed and participated in the search. Thus Corngold should be limited to its particular factual situation and should have no application to a case such as this one where a conscientious private citizen suspects that he has discovered contraband and a police officer arrives upon the scene merely to corroborate or reject the citizen's suspicions.

2. The Search Of Cruz' and Guttierez' Motel Room On May 12, 1966, Was Lawful As It Was Based On Probable Cause.

At the time that the Los Angeles Police Officers proceeded to the Gales Motel to arrest appellants Cruz and Guttierez they were aware of the following facts and circumstances:

1. Alfred Ales had told the police Officers that appellant Daniel Duran had employed two male Mexicans to smuggle heroin for him from Mexico on a regular basis.

2. Ales told the police that the two Mexicans stayed at Motels in the El Monte and San Gabriel area.

3. Ales also informed the police that Robert Vasquez was employed by Duran to accept delivery and store the heroin for him.

4. Ales told the Officers that on May 5th two male Mexicans had delivered heroin to Vasquez and Ales to store for Duran.

5. On May 11, 1966, at approximately 4:00 P. M., appellants Cruz and Guttierez checked into Room 24 at the Gales Motel.

6. At approximately 6:00 P. M., on May 11, 1966, the officers arrested Robert Vasquez at his residence and found him to be in possession of narcotics and a card bearing the writing -- Room 24, Gales Motel, 3029 So. San Gabriel.

7. When the officers arrived at the Gales Motel they observed a car in the stall reserved for Room 24. The officer

was able to determine that the car was registered to 3520 Warwick Street, Los Angeles, California, an address where officer Sanchez had seen appellant Daniel Duran on several occasions.

The Supreme Court, on numerous occasions, has defined "probable cause". In Brinegar v. United States, 338 U.S. 160, 175 (1949), the Court stated:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

It is the rule that probable cause to arrest may be established solely on information received from a reliable informant. An informant is reliable if the information he supplies is corroborated. Jones v. United States, 326 F.2d 124 (9th Cir. 1963), Draper v. United States, 358 U.S. 307 (1959). The facts and circumstances listed above which were within the officer's knowledge prior to the arrest clearly indicate that the information supplied by Alfred Ales had been corroborated. It is submitted that the above mentioned information constituted facts and circumstances within the arresting officer's knowledge which were sufficient to warrant a prudent man in believing that appellants had committed and were committing a violation of the state and federal narcotics

laws.

3. Appellants Have Waived Their Right To Object To The Entry Into Room 24 Of The Gales Motel.

Appellants argue that the police officers entry into Room 24 at the Gales Motel on May 12th was unlawful in that there was a failure to comply with Section 844 of the California Penal Code which requires that a police officer, before breaking open a door to effect an arrest, must first demand admittance and explain the purpose for which admittance is desired. The Government would submit that appellants' failure to file a pre-trial motion under Rule 41(e) to suppress precludes them from now raising this issue for the first time on this appeal. The Government's argument with regard to waiver for failure to comply with Rule 41(e) is set forth above and will not be reiterated.

The Court's attention is respectfully directed to the Reporter's Transcript, page 223, for Officer Sanchez' testimony indicating that he did knock on the door of Room 24 on two occasions and identify himself as a police officer. Furthermore, the record is clear that at no time did trial counsel for appellants object to the entry on the basis that there had been a failure to comply with Section 844 of the California Penal Code. When counsel finally did make a belated objection to the introduction of the card seized from appellant Cruz (Exhibit 8) the objection was on the grounds of an illegal search and seizure apparently based on the fact that the officers were not in possession of warrant of

arrest or a search warrant [R. T. 234].

It is submitted that trial counsel's failure to object to the police officers' entry into Room 24 either in a Rule 41(e) motion prior to trial or during the actual trial precludes appellants from raising this issue for the first time on this appeal.

4. The Package Found In The Gales Motel Was Lawfully Obtained.

Appellants complain that the package containing heroin found by Mrs. Wise in their motel room approximately eleven hours after they had been arrested was inadmissible in that the officers opened the package without first obtaining a search warrant. Appellants also contend that Mrs. Wise's conduct "was as much a part of the police action as if she had helped the officers search the room the night before." (Appellants' Brief, page 51). The Government would contend that Mrs. Wise's action in turning over the package to the police was the action of a private citizen whose suspicions had been duly aroused the previous evening by the police arrest of the occupants of Room 24.

The record is clear that Mrs. Wise did not enter the room with any intent to further police activities. She entered the room for the sole purpose of cleaning it so that it would be in order for the next occupants. After finding the package inside the waste-basket Mrs. Wise proceeded to turn it over to the police, apparently assuming that the package had eluded the police search the

evening before. Again, as in the case of the seizure of the package found at the Alexandria Motel, we have a private party discovering a suspicious package and turning it over to the police. Again Burdeau v. McDowell, supra, should be applicable. After Mrs. Wise found the package and turned it over voluntarily to the police "no further Government action was necessary to procure the evidence. There was nothing left to seize and no search was necessary." (Appellants' Brief, page 39).

The Government would also submit that in the case at bar appellants may be deemed to have abandoned the package and are therefore precluded from asserting that the seizure of the package was the result of an unlawful search and seizure. Mrs. Wise testified that she found the package in a wastebasket underneath the writing desk. At the time that the package was found appellants had been forcibly ejected from the Motel room therey effecting an abanonment of any property which they voluntarily choose to leave behind. Abel v. United States, 362 U.S. 217 (1960).

C. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT ON COUNT V.

1. The Evidence Established That Appellant Duran Was In Constructive Possession Of The Heroin Charged In Count V.

Appellant Duran argues that the evidence with regard to Count V is insufficient on two grounds: (1) that the evidence failed to establish any connection between Duran and his co-defendant Cruz and Guttierez, and (2) that the evidence failed to prove that Duran was in dominion and control of the narcotics seized at the Gales Motel.

The following evidence established Duran's connection with appellants Cruz and Guttierez:

(1) Alfred Ales testified that he and Robert Vasquez were employed by Duran to receive and conceal smuggled heroin pending Duran's directions as to the ultimate disposition of the heroin.

(2) Ales also testified that two male Mexicans would bring the narcotics into the county on a regular basis for Duran and that they would stay in motels in the El Monte-San Gabriel area.

(3) Ales also testified that on the morning of May 5, 1966, two male Mexicans delivered narcotics to Ales and Vasquez pursuant to Duran's instructions.

(4) Ales testified that after receiving delivery of the

heroin, he and Robert Vasquez divided the heroin pursuant to Daniel Duran's instructions. It was stipulated that of the twenty-nine condoms in Exhibit I-B, three condoms had fingerprints which were those of Robert Vasquez and Alfred Ales [R. T. 402].

(5) Ales testified that Robert Vasquez was employed by Duran to accept the delivery of smuggled narcotics from two male Mexicans who would bring the narcotics into the country on a regular basis and stay at motels in the El Monte-San Gabriel area.

Appellants Cruz and Guttierez brought 20 ounces of heroin into the country from Mexico. Appellant Cruz had the telephone number of Robert Vasquez on his person at the time that he was arrested and Robert Vasquez had the name of the motel, the address, and the room number where appellants Cruz and Guttierez were staying.

(6) Appellants Cruz and Guttierez were driving a vehicle registered to a Los Angeles address where officers had seen appellant Duran on several occasions.

(7) Appellant Guttierez and another male Mexican had commenced staying at the Gales Motel six months prior to May 11, 1966. According to the testimony of Mrs. Wise they came twice each month [R. T. 169]. Mrs. Wise also testified that Exhibit VII contained four registration cards for the months of March and April, 1966. Mrs. Wise observed appellant Guttierez sign each of the four cards always using a different name [R. T. 183].

It is submitted that Ales' testimony that Duran had employed two male Mexicans to bring narcotics into the country on a regular

basis, the fact that appellant Guttierez was a twice monthly visitor to the Gales Motel, the fact that appellant Cruz was found to have Robert Vasquez's telephone number in his possession at the time of his arrest coupled with the evidence that the car being driven by appellants Cruz and Guttierez was registered to an address where Duran had been seen on several occasions is sufficient to establish the requisite connection between all three appellants. As this Court has stated:

> "It must be noted that once the existence of a conspiracy is shown slight evidence is all that is required to connect the defendant with the conspiracy." Sabari v. United States, 333 F. 2d 1019 (9th Cir. 1964).

It is of course the rule that a jury can convict on the uncorroborated testimony of an accomplice.

Quiles v. United States, 344 F. 2d 490 (9th Cir. 1965);

Lyda v. United States, 321 F. 2d 788 (9th Cir. 1963);

White v. United States, 315 F. 2d 113 (9th Cir. 1963);

Bible v. United States, 314 F. 2d 106 (9th Cir. 1963).

2. The Evidence Is Sufficient To Sustain The Finding That Appellant Duran Had The Power To Exercise Dominion And Control Over The Heroin Found At The Gales Motel.

Appellant Duran argues that he may not be found to have had dominion and control over the narcotics because the evidence

did not show that he had actually paid for the narcotics. This argument, however, assumes that payment was to have been made only upon actual delivery. It is, of course, quite possible that at least partial payment had been made by Duran prior to its importation into the country. Appellants' argument also assumes that payment is a condition precedent to the exercise of dominion and control over a quantity of narcotics. This Circuit has stated that possession is that exercise of "dominion and control so as to give a power of disposal."

Arellanes v. United States, 302 F. 2d 603, 606 (9th Cir. 1962).

Clearly the jury found that Duran directed the importation of the narcotics into the country and that he had arranged for its transfer to Robert Vasquez. Thus Duran was in a position to exercise a power of disposal over the narcotics as it was continually subject to his discretion from the time of its entry into the country up until its final intended disposition.

3. The Evidence Sustains The Finding That Appellants Cruz And Guttierez Were In Joint Possession Of The Heroin Found Inside Their Motel Room.

Appellants Cruz and Guttierez argue that the evidence was insufficient to prove that they were in joint possession of the narcotics found in their room. Appellants' contention is that there was no evidence showing knowledge of either appellant that one or both

of them possessed the narcotics found inside the room.

The Government would submit that there was more than sufficient evidence to establish that appellants Cruz and Guttierez were engaged in a joint venture with regard to the heroin found in their motel room. The evidence established that on May 11, 1966, at 11:30 A. M., Audrey Wise, Manager of the Gales Motel in San Gabriel, cleaned Room 24. When she had finished, the waste-basket was in the bathroom where it belonged and it was empty. Exhibit 2-B (the 20 ounces of heroin) was not in Room 24 [R. T. 187, 188]. After cleaning the room she locked the door.

At 4:00 P. M., on May 11, appellants Cruz and Guttierez rented a room at the Gales Motel [R. T. 167]. Mr. Cruz and Mr. Guttierez had no baggage, clothing or personal toiletries. They were given Room 24. Only two keys existed for Room 24, the house key and the key given to Mr. Guttierez [R. T. 188]. The two appellants drove to the motel in a car belonging to Guttierez but being driven by Cruz.

At approximately 12:30 A. M., on May 12th, police officers proceeded to the Gales Motel and placed the two appellants under arrest. A cardboard card was seized from the person of appellant Cruz on which was written the telephone number of Robert Vasquez. Sergeant Sanchez searched Room 24. He was alone in the room with the two defendants during most of his search. He did not look under the writing table or observe any waste paper basket there as that was where the two appellants were sitting [R. T. 430].

When Sergeant Sanchez entered Room 24, it was locked.

When Sergeant Sanchez left Room 24, after arresting Cruz and Guttierez he locked the room [R. T. 239].

Later in the morning of May 12, 1966, Mrs. Wise unlocked Room 24 and entered for the purpose of cleaning. Under the writing desk, behind a chair was the bath room waste paper basket, laying on its side against the wall. The basket contained Exhibit II-B [R. T. 191, 192].

Clearly a question of fact was raised as to whether or not appellants Cruz and Guttierez were in joint possession of the heroin found inside their motel room. There was no heroin in Room 24 before Cruz and Guttierez arrived. When the Officers removed Cruz and Guttierez from Room 24, they locked the door. The door was still locked when Mrs. Wise entered and found the heroin.

In deciding whether Cruz and Guttierez were in joint possession of Exhibit II-B the jury may properly have considered appellants' testimony at the trial as indicating a consciousness of guilt. Both appellants Cruz and Guttierez testified. Their testimony was almost identical and may be considered as a whole. They testified that they had made only three trips to the United States, always together, and on each occasion they stayed at the Gales Motel [R. T. 377, 420]. This is contradicted by the testimony of Audrey Wise, the motel manager, who testified that for the six months prior to May 11, 1966, Mr. Guttierez and another male Mexican had been guests at the Gales Motel. They came twice each month, and on each visit, they stayed only one night [R. T. 169, 170]. Mrs. Wise testified that Exhibit VII contained four

registration cards for the months of March and April of 1966. She observed appellant Guttierez sign each card in Exhibit VII, always using a different name [R. T. 183]. Appellant Guttierez denied signing any of the four registration cards in Exhibit VII [R. T. 379, 380]. Appellants Cruz and Guttierez testified that they did not know anyone in Los Angeles, and in particular, they did not know Robert Vasquez or his telephone number [R. T. 122-125, 424]. This is contradicted by the fact that on May 11, 1966, Robert Vasquez had the name, telephone number and room number where appellants Cruz and Guttierez were staying. In addition, at the time of his arrest appellant Cruz had on his person the telephone number of Robert Vasquez. Appellant Cruz testified that he did not have Exhibit VIII on his person at the time of his arrest and further that he had never seen Exhibit VIII before [R. T. 424-426]. Officer Sanchez testified that Exhibit VIII contained the telephone number of Robert Vasquez and was taken from the pocket of appellant Cruz at the time of his arrest.

In deciding whether appellants Cruz and Guttierez may be found to have been in joint possession of the heroin found in Room 24 the case of Eason v. United States, 281 F. 2d 818 (9th Cir. 1960) is particularly applicable. In Eason the two appellants had been friends for about two years. On May 8, 1959, by mutual agreement, they traveled from their home in Ingleside, California, to Tijuana, Mexico. The two men drove to Tijuana in Eason's 1951 Dodge convertible. Appellant Nowlin provided the gasoline and food out of his funds. The two men arrived in Tijuana about

6:00 P. M. , and were there until around 9:30 P. M. The appellants walked about Tijuana, went to a dog race and spent some time in a few cafes. They were together most of the time. Throughout their stay in Tijuana the car had been parked with the top down. As they were crossing the border on their return trip they were stopped because an inspector felt that they appeared nervous and because of their manner of answering questions. A search of the car produced a paper bag containing narcotics. The narcotics were found secreted behind the dashboard. Both appellants denied knowing that the narcotics were in the car. The Ninth Circuit affirmed the conviction holding that:

> "Possession can be established by circumstantial evidence . . . (citations omitted). Indeed, one might ponder long before discovering any other possible form of proof aside from admission." Id. at p. 820.

Further on the Court held:

> "As for the contention, advanced by each, that the other could have been the possessor, the evidence of close friendship, joint venture and general conduct were sufficient to warrant a reasonable jury finding beyond reasonable doubt that possession was joint." Id. at p. 821.

It is submitted that the record in the instant case clearly establishes that appellants were friends and associates engaging in a joint venture and that their general conduct and testimony were

sufficient to warrant a reasonable jury in finding beyond reasonable doubt that possession was joint.

D. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE FINDING OF GUILT ON COUNT ONE.

1. The Court Properly Instructed The Jury With Regard to the Conspiracy Charge.

Appellants argue that the Court's instruction to the jury with regard to the conspiracy offense was defective in that in enumerating the essential elements of the conspiracy offense the Court did not include specific knowledge of illegal importation as one of the necessary elements. In considering appellants' contention the Court must consider the instructions as a whole to determine whether the jury was properly instructed with regard to knowledge of illegal importation.

Toward the beginning of the Court's instructions the jury was advised that they would be permitted to take the indictment into the jury room with them [R.T. 541]. They were then advised as follows:

> "The only counts that you are to consider here are counts 1, 2 and 5 . . .
>
> "Now under the law that is applicable here, which covers this situation, it provides as follows:
>
> "Whoever fraudulently or knowingly

receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported and brought in knowing the same to have been imported or brought into the United States contrary to law . . . or whoever conspires to do any of the foregoing acts shall be guilty of an offense against the laws of the United States . . . " (Underscoring supplied) [R. T. 541].

Judge Carr then proceeded to instruct the jury separately on Count 1 and on Counts 2 and 5. Although he did not mention knowledge of illegal importation again in connection with Count 1 when he specified the particular elements of conspiracy, his comments earlier, together with the admonition that all the instructions should be considered together [R. T. 534], made it patently clear to the jury that knowledge of illegal importation was an essential element of the crime of conspiracy just as it was an essential element of the substantive crime under section 174.

Appellants rely on United States v. Massiah, 307 F. 2d 62 (2nd Cir. 1962), reversed on other grounds 377 U. S. 201 (1964). In Massiah, the trial court judge erroneously instructed the jury that defendant was charged under the general conspiracy statute, 18 U. S. C. 371, rather than under the conspiracy clause of 21 U. S. C. 174. Although the Second Circuit did not find this action standing alone to be prejudicial, it noted that the trial judge did

not at any time in his instruction on the conspiracy count advise the jury that knowledge of illegal importation was a requisite element of conspiracy. Moreover, and more significantly the court's instructions suggested to the jury that knowledge of illegal importation was not necessary for conviction. Thus, in reversing, the court in Massiah emphasized that the trial court not only failed to mention knowledge of illegal importation as an essential element of the crime but also indicated that it was not even an element of the offense.

The Second Circuit distinguished Massiah in United States v. Bentvena, 319 F. 2d 916 (2nd Cir. 1963), cert. denied sub. non Ormentio v. United States, 375 U. S. 940. In Bentvena, the trial court judge, at the beginning of his instructions to the jury, read the indictment which mentioned knowledge of illegal importation as an element of the crime. The trial judge then explained that the defendants were charged with conspiring to violate §§173 and 174 of Title 21 U. S. C. The Bentvena court observed that the above factual pattern differed from that which confronted the Massiah court. Although the trial judge in Bentvena set out 3 elements of knowledge of illegal importation, he repeatedly referred to the conspiracy "as charged in the indictment". Thus, the court in Bentvena concluded that the jury was sufficiently instructed as to this element of the crime.

The instant case shows a marked similarity to Bentvena. Although he did not read the indictment, Judge Carr read §174 to the jury which is tantamount to what the trial judge did in Bentvena.

Moreover, he allowed the jury to take a copy of the indictment into the jury room to be used during their deliberations. Unlike Massiah, Judge Carr did not charge the jury under the wrong statute, he did not in any way indicate that this element was not an essential requirement of the crime of conspiracy under §174. Thus the jury was sufficiently advised that the element of knowledge of illegal importation was an element of the crime and that a finding of the presence of this element was prerequisite to returning a guilty verdict on count 1.

2. The Evidence Was Sufficient To Sustain Appellants Cruz And Guttierez Conviction On The Conspiracy Count.

Appellants Cruz and Guttierez contend that the evidence failed to establish that they had entered into a conspiracy with appellant Duran and Robert Vasquez. The Government would submit that the evidence as set forth above clearly establishes that appellants Cruz and Guttierez were employed by appellant Duran to import narcotics into the country on a regular basis.

Particularly applicable to the conspiracy count is the case of Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956). In the Sandez case an undercover agent of the Federal Bureau of Narcotics had been purchasing narcotics from a Vince Perno. In most of the contacts with the defendant Perno the telephone number PL 8-1879 was utilized. The undercover agent had information

that other unnamed persons were involved in the commission of the felony. On the last transaction the undercover agent was to acquire narcotics at a particular motel. At the time of this sale, an automobile bearing Baja California license plates was parked in the vicinity. Inside the motel room Vince Perno delivered the narcotics and was arrested. The occupants of the car from Baja California, were then arrested and for the first time identified as Sandez and Flores. Sandez was searched and on his person a business card of a Dr. Eloy Ovando, Tijuana. On the reverse side was written "Vince - PL-97818". This was the telephone number used by Vince Perno, provided that the numerals were read in reverse order. The search of Flores revealed a similar business card bearing on the reverse side a telephone number PL-81879. A search of Vince Perno revealed a business card of Dr. Eloy Ovando, Tijuana, on the reverse side was written Freddie Sandez with an address in Tijuana. There was no testimony as to who Freddie Sandez was or whether he was connected with the defendant Sandez. The Circuit Court held that " . . . there thus existed some substantial evidence to tie both Flores and Sandez into the conspiracy. This presented an issue of fact on which the jury was entitled to, and did, find adversely to the appealing defendant. There being substantial evidence in existence for the triers of fact to pass on, we cannot disturb that verdict on appeal . . . it is not for this court to reevaluate the evidence or substitute our judgment for that of the jury." Id. at 243.

Also applicable to the conspiracy charge in the instant case

is Diaz-Rosendo v. United States, 357 F. 2d (9th Cir. 1966). In Diaz-Rosendo, the indictment alleged a conspiracy to import marihuana and a substantive count of smuggling marihuana. The defendants were convicted of both counts. The Government's key witness was an accomplice who testified that a person in Mexico hired him to drive a car containing marihuana from Mexico to Los Angeles. The person in Mexico gave him a piece of paper on which was written a Los Angeles telephone number, the name Aspuro and Room 114. The telephone number was a motel where the defendants Diaz and Fernandez occupied Room 114, Room 114 had been rented in the name, Aspuro. The accomplice testified that after entry into the United States he called the telephone number and spoke to Aspuro. The accomplice stated he was having car trouble and a meeting was arranged. The defendants Fernandez and Diaz met the accomplice at a cafe. Defendants Fernandez and Diaz helped repair the accomplice's car. The accomplice then drove his car which contained marihuana. Diaz and Fernandez drove in their separate vehicle. Both cars drove the same route until an inspector attempted to stop both vehicles. The accomplice stopped his car but Diaz and Fernandez continued to drive on. Defendants Diaz and Fernandez contended that the evidence was insufficient. The Circuit Court affirmed the conviction noting that a part of the evidence was direct but the larger portion thereof was circumstantial and that conspiracy can rarely be proved other than by circumstantial evidence.

E. APPELLANTS WERE NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

1. Appellants Voluntarily Chose to be Represented by One Counsel and Were in no Way Prejudiced by the Exercise of that Right.

Appellants after having retained a highly qualified and experienced criminal trial lawyer, now contend that they were denied effective assistance of counsel because each had a "potential" defense of incriminating his co-defendant thereby exculpating himself. It is interesting to note that appellants use the term "potential defense" rather than "actual defense" because the record is quite clear that both Cruz and Guttierez set forth the entirely consistent defense that neither of them knew Robert Vasquez or Daniel Duran or had anything to do with the narcotics found inside their motel room. Perhaps had the appellants actually set forth defenses inconsistent with each others innocence they would now have some basis for asserting that a conflict of interest arose thereby depriving them of the effective assistance of counsel contemplated by the Sixth Amendment. However, to conjure up potentially conflicting defenses, out of a hat as it were, and then to argue that these felicitous conjurings constitute a basis upon which to set aside their convictions flies in the face of the record established by the appellants sworn testimony.

Appellants also allege that the trial court failed to

inquire affirmatively into possible conflicts of interest and insure that the choice to proceed with joint representation was a knowing one. This allegation again flies in the face of the record which shows that on not one but two separate occasions the court told trial counsel to inform the Court if there was the "slightest hint of conflict you had better be sure of it in advance before we come to trial." [R. T. 4, Vol. A.]

Appellants rely upon Glasser v. United States, 315 U.S. 60 (1942), in support of their contention that they were denied the effective assistance of counsel. In the Glasser case, supra, the Supreme Court of the United States declared that where a conflict of interests between co-defendants exists, joint representation by one attorney violates the Sixth Amendment right to effective assistance of counsel. The Court stated that the trial judge is charged with the duty to protect the constitutional rights of the defendant. Since the defense counsel had informed the trial judge of a possible conflict of interest, the Glasser court held that the trial judge had failed to exercise the proper concern for the basic rights of appellant in not informing him of his right to obtain separate counsel.

The Supreme Court noted the difficulty in determining the precise degree of prejudice suffered by the petitioner in sharing counsel with a co-defendant. However, the Court reversed, adjudging that appellant's defense would have been more effective had he been represented by separate counsel since (1) the liberal rules of evidence in conspiracy cases magnify the importance of assuring the undivided attention of counsel on behalf of a defendant, and

(2) the trial record revealed that counsel failed to cross-examine certain witnesses so as to develop Glasser's defense.

The appellants Duran, Guttierez and Cruz cite several cases arising from the District of Columbia Circuit. Since Glasser, the various Circuits have been confronted with the same problems on numerous occasions, and their decisions have not been unvarying.

In Campbell v. United States, 352 F. 2d 361 (D. C. Cir. 1965), the District of Columbia Circuit Court of Appeals, extending and elaborating the Glasser holding, ruled that,

> " . . . a trial judge has a responsibility to assure that co-defendants' decision to proceed with one attorney is an informed one." Id. at 361).

Thus, according to Campbell, the trial judge has the affirmative duty to apprise the defendants of the potential risks of joint representation, so that in choosing to be represented by one attorney he will have made an intelligent waiver of his right to the unimpaired assistance of counsel. In this case, the trial record did not indicate whether appellants were aware of the importance of retaining separate attorneys or of the danger inherent in joint representation. While the Campbell court did not attempt to formulate a standard by which to determine whether a criminal defendant had been prejudiced by sharing counsel with a co-defendant, it did find sufficient prejudice requiring reversal since (1) defense counsel made no effort to dissociate appellant Glenmore from his co-defendant, and (2) defense counsel did not raise the issue of the insufficiency of the evidence at

the close of the trial. The Court disregarded the possibility that the above strategic errors resulted from oversight by noting that if Glenmore had been represented by separate counsel he would have been able to cross-examine co-defendant Campbell on his testimonial assertions that he was in appellant's company during the entire evening of the commission of the alleged crime.

In Lollar v. United States, 376 F. 2d 243 (D. C. Cir. 1967), the District of Columbia Circuit was again called upon to determine whether joint representation of co-defendants violated Sixth Amendment rights and prejudiced appellant's defense. The Lollar court noted that the trial record did not indicate whether the district court judge considered the potential conflict of interests of the co-defendants, nor did it indicate whether it had advised them "of their right under the Criminal Justice Act (of 1964) to have separate counsel if their interests were so conflicting that they could not properly be represented by the same counsel." (Id. at 245). In view of these circumstances, no intelligent waiver by appellant could be inferred. Proceeding to the question of whether appellant was prejudiced by joint representation, the court in Lollar admitted that the federal circuits were divided on the question of determining what degree of prejudice was necessary for reversal. The court noted the Ninth Circuit decision in Lugo v. United States, 350 F. 2d 858 (9th Cir. 1965) as "apparently requiring a very strong showing of actual prejudice, while others suggest . . . the possibility of prejudice is sufficient." Id. at 246 & n. 7). The Lollar court adopted the latter view:

"We hold, therefore, that only where 'we can find no basis in the record for an informed speculation' that appellant's rights were prejudicially affected 'can the conviction stand. . . .'

"In effect, we adopt the standard of 'reasonable doubt', a standard the Supreme Court recently said must govern whenever the prosecution contends the denial of a constitutional right is merely harmless error." (Id. at 247).

The court found three weak evidentiary pegs on which to base its conclusion that appellant might have suffered possible prejudice: (1) co-defendant's testimony referring to appellant (a male adult) in the feminine gender might have created an adverse impression on the jury but counsel failed to object (the court ignored the fact that appellant's defense was based on his claim of a homosexual relationship with co-defendant); (2) appellant testified at trial and thus the Government was able to elicit evidence of his prior criminal record for impeachment purposes. The court in Lollar believed that this strategic decision would not have been made if counsel had been solely concerned with appellant's defenses; and (3) counsel confused the names of Lollar and co-defendant Ford during the trial proceedings. The District of Columbia Circuit essentially reaffirmed its holding in Lollar in Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967) where the appellant Ford was the co-defendant of defendant Lollar. However, the Ford court went a step farther than Lollar by

enunciating the rule that hereafter, under the aegis of the Criminal Justice Act of 1964 (18 U. S. C. 3006 (A)(b)) [3/] the trial courts of the District of Columbia Circuit shall initially appoint separate counsel for each co-defendant. Only if counsel believes no conflicting interest exists or is possible, and only if defendants make an intelligent waiver, will joint representation by one counsel be allowed. While every case turns on its particular facts, the opinions of the District of Columbia Circuits differ materially from those issued in the Ninth Circuit. The Ninth Circuit -- as the Lollar court noted -- has heretofore required a showing of actual prejudice before it will determine that a defendant's right to effective assistance of counsel has been violated by joint legal representation.

In Lugo v. United States, 350 F. 2d 858 (9th Cir. 1965), this Circuit noted the following language from Glasser:

> "The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Glasser v. United States, supra, at 76).

However, the Lugo court rejoined that:

> "[N]either can we create a conflict out of mere conjecture as to what might have been shown." (Id. at 850).

3/ "The United States Commissioner or court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel."

In Kaplan v. United States, 375 F.2d 895 (9th Cir. 1967), cert. denied 389 U.S. 839, the Ninth Circuit upheld the convictions of defendants who argued on appeal that joint representation violated their Sixth Amendment rights. Before trial, counsel for the defense indicated that no conflict of interest existed. In rejecting the appellants' contention, the Kaplan court stated that:

> "In determining this question (of conflict of interest), the trial court must be able, and be freely permitted, to rely upon counsel's representations that the possibility of such a conflict does or does not exist. The necessary adequate representation by an attorney which the law requires implies that the court may rely on the solemn representation of a fact made by such attorney as an officer of the court. The court may go further into the factual situation if he desires, but is under no original or continuing obligation to do so." (Id. at 897).

Moreover, each defendant was found to have made an intelligent waiver of his right to separate counsel. The Kaplan decision illustrates the more stringent standard of the Ninth Circuit in requiring a showing of actual prejudice in contrast to that employed by the District of Columbia Circuit. Noting appellants' admission in their brief of their inability to show actual prejudice, the Kaplan court concluded that on appeal the Ninth Circuit will not,

> "Speculate whether or not there could have existed

some other possible conflict of interest not factually disclosed, or even suggested by a careful reading of the record before us." (Id. at 898 & n. 5).

The Ninth Circuit reached the same result in Juvera v. United States, 378 F. 2d 433 (9th Cir. 1967), cert. denied 389 U. S. 1008. In Juvera, the defendants contended that the trial judge erred in failing to inform them at the commencement of trial of the possible conflict of interests involved in having one attorney present their defenses. The Ninth Circuit court rejected this contention, holding that the trial judge has no such duty or obligation (Id. at 437).

Accord: Kruchten v. Eyman, 276 F. Supp. 858, 860 (D. C. Arizona 1967);

See also: Peek v. United States, 321 F. 2d 934, 944 (9th Cir. 1963), cert. denied 376 U. S. 954 (1964);

Gonzales v. United States, 314 F. 2d 750 (9th Cir. 1963).

In the instant case the record is clear that the trial court twice inquired of appellant's trial counsel whether any conflict of interest existed. Both times trial counsel responded that there was no conflict. The court properly relied on trial counsel's representations. Furthermore, appellants have made no showing of actual prejudice brought about by virtue of their joint representation. It follows that appellants were in no way denied the effective assistance of counsel as contemplated by the Sixth Amendment.

2. Trial Counsel's Trial Strategy Did Not Deprive Appellants of the Effective Assistance of Counsel.

Appellants now argue that if they are deemed to have waived their right to object to the admissibility of certain evidence then the ineffectiveness of their trial counsel has been established. A careful review of the record, however, establishes that such is not the case.

Basically we are dealing with trial counsel's strategy with regard to the searches of May 6, 1966, and May 12, 1966. In connection with the search of May 6, 1966, appellants' trial counsel sought to suppress the testimony of the accomplice Alfred Ales. He filed a lengthy motion and an affidavit of appellant Duran. While it is true that counsel at no time, either before, or during trial, ever made a Rule 41(e) motion with regard to the seizure of the heroin found in Ales' motel room, it is clear that this was a tactical decision on the part of an experienced federal criminal trial lawyer and in no way reflects inadequate preparation on the part of counsel.

With regard to the search of the Gales Motel on May 12, 1966, trial counsel did interpose a belated objection to the search of Room 24. His explanation for the lateness of his motion was that while he had been made aware of the circumstances surrounding the search he did not feel that it was relevant until the moment at which he made his objection. Clearly this negates any allegation of inadequate preparation. Mr. Marcus was made aware of the facts of the search long prior to trial but these facts did not, in his best judgment, became relevant until the moment at which he objected.

In effect the rule that appellants contend for is that any time trial counsel is deemed to have waived any motion he therefore becomes ipso facto, incompetent. A rule such as the one contended for by appellants would leave virtually every record open for a collateral attack should a reviewing court refuse to consider an objection raised for the first time on appeal. It is significant to note that in none of the cases cited by appellee in which a reviewing court held a waiver of the right to make a Rule 41(e) motion was counsel therefore deemed to be incompetent. We submit that trial counsel in the instant case pursued a well planned trial strategy and that to subject him to an allegation of incompetency merely because the jury convicted is unjustified by the record and under the prevailing cases.

F. THE TRIAL COURT IN NO WAY DENIED APPELLANTS A FAIR TRIAL.

Appellants contend that the trial court made frequent remarks which tended to disparage defense counsel thereby depriving appellants of a fair trial. Appellants then proceed to cite numerous colloques between the court and defense counsel and argue that these prejudiced appellants.

It is significant to note that a great many of the comments referred to by appellants which they claim disparaged and deprecated their defense were made outside of the presence of the jury and therefore in no way could have affected the jury verdict (Appellants' Brief, pp. 91, 92, footnote 6, p. 86, footnote 7).

It is also important to note the numerous times during the course of the trial that the court instructed the jury to disregard the court's comments. The following references are cited merely to direct this Court's attention to the careful manner in which the trial court instructed the jury in that regard. At R. T. 17, the court instructs the jury to disregard the court's comments on the law; at R. T. 38, the court instructs the jury that when the court makes a ruling or comment it is not evidence and they are to disregard it; at R. T. 71, the court instructs the jury that "my comments to counsel are not evidence and they should not persuade you in any way in connection with this case"; at R. T. 278, the court instructs the jury to disregard the statements of counsel and the court; at R. T. 360, the court instructs the jury to disregard the court's remarks; at R. T. 399, the jury was instructed that, "what the lawyers say and what the Court says, except when the Court is giving you the law, can be completely disregarded and should be disregarded by you. Pay no attention to it at all"; at R. T. 465, the jury was instructed that "if the Court has criticized counsel it has absolutely no bearing on the case"; at R. T. 534, during the court's final instructions to the jury he carefully charged them that,

> "Any comments by the Court or by counsel are not evidence. And if this Court has come out and said something that has given you any impression at all as to the guilt or innocence of these defendants, you are not only at liberty to disregard it, you are duty-bound by your oath to disregard it if

your conscience speaks to the contrary, because, I repeat, you are the sole judges of the facts."

Finally, at the conclusion of the final instructions the jury was instructed that "any remarks by the Court, if you considered them to be a bit harsh toward one of the other counsel, forget them. They have no bearing in your consideration of the case." [R. T. 556].

We submit that a careful reading of the transcript indicates that the trial court carefully protected the appellants' rights with frequent instructions to the jury to consider only sworn testimony as probative evidence.

Appellants also contend that the trial court's denial of their motion to suppress the testimony of Alfred Ales and his remarks with regard to the Miranda case denied them a fair trial in that their defense was disparaged in the eyes of the jury. Had Ales been deemed constitutionally unqualified to testify appellants' point might be well taken. Then the point could well be made that the jury might have speculated with regard to the nature of the obviously incriminating testimony that they were not being permitted to hear. But in the case at bar the jury was permitted to hear Ales' testimony. They were not deprived of any testimony and were under no compulsion to speculate as to what the nature of the suppressed testimony might have been. We submit that the court's denial of appellants' motion to suppress Ales' testimony coupled with the court's instructions to the jury to disregard the court's comments on the law adequately protected the appellants' rights and in no way denied them a fair trial.

G. THERE WAS NO MULTI-COUNT PREJUDICE IN THE INSTANT CASE WHICH WOULD REQUIRE A REVERSAL OF THE JUDGMENT OF CONVICTION.

Appellants argue that if this Court finds that any error was committed with regard to any one count of the indictment the entire case must be reversed because "the charges are so interrelated that it cannot be said that an error as to one count did not raise a reasonable possibility that the evidence complained of might have contributed to the conviction on other counts." (Appellants' Brief, p. 100). Clearly this is not the law. In a multi-count conviction, if concurrent sentences are imposed, the judgment of conviction will stand if any one count is sustained. Hirabayashi v. United States, 320 U.S. 81 (1943). Furthermore, a close scrutiny of the record does not disclose such an inextricable interrelationship between counts.

The only errors complained of by appellants that would of necessity affect the entire trial would be (1) that they were denied the effective assistance of counsel and (2) that the trial court's conduct was so prejudicial as to deny appellants a fair trial. Clearly, any of the other alleged errors, if such there were, would affect only the count to which they were related.

For example, if the seizure from Alfred Ales' motel room is deemed to be lawful then Count 2, with regard to appellant Duran, must be sustained regardless of the legality of the search and seizure at appellants Cruz and Guttierrez motel room on May 12th. The

testimony of Alfred Ales with regard to Count 2 would be enough, standing by itself, to convict appellant Duran even if it were not corroborated. Quiles v. United States, supra. However, the instant record discloses that Ales was corroborated on many significant parts of his testimony, perhaps the most important of which was that Ales testified that he was expecting appellant Duran to contact him on May 6th with regard to the disposition of the 24 ounces of heroin Ales was holding for Duran. On the evening of the 6th Officer Sanchez observed Duran enter Ales' residence and stated to him, "have you got it?"

We would submit that if any error was committed with regard to either of the searches in question that error must be limited to the related count.

Courtney v. United States, No. 20,769 (9th Cir. March 1, 1968, Slip Sheet Opinion).

Appellants cite Chapman v. California, 386 U.S. 18 (1967) and Fahy v. Connecticut, 375 U.S. 85 (1963) and argue that "in a narcotic case such as this involving substantive counts and a conspiracy count, the error cannot possibly be considered harmless" and that, therefore the Government cannot prove beyond a reasonable doubt that the error complained of did not contribute to the guilty verdict. Yet in Chapman v. California, supra, the Supreme Court held that not all constitutional errors require reversal.

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant

that they may be, consistent with the Federal Constitution, be deemed harmless, nor requiring the automatic reversal of the conviction."

Id. at 22.

In the case at bar the two searches in question are the subject of two separate substantive charges unlike the situation in the Chapman and Fahy cases supra, where the defendants were charged in single count indictments and any error must, of necessity, have affected the convictions. We would submit that each count in the instant indictment is supported by substantial independent evidence and should stand or fall by itself, regardless of the determination as to the other counts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellants Duran, Cruz and Guttierez should be affirmed.

Respectfully submitted,

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